

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TAMMY J. KOKER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,465
<b>EXPRESS PERSONNEL</b>	)	
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY OF THE STATE</b>	)	
<b>OF PENNSYLVANIA</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the April 13, 2009, Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits for an 8.5 percent impairment to her left upper extremity but was denied any compensation to her right upper extremity.

Claimant appeared by her attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, P. Kelley Donley of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on August 21, 2009.

**ISSUE**

What is the nature and extent of claimant's injuries from the series of accidents suffered through her last day worked with respondent on June 25, 2007? Claimant alleges that her injuries included both her left and right upper extremities pursuant to the opinion of board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., and the ALJ erred in limiting the award to her left upper extremity only. Respondent argues that the opinion of board certified orthopedic surgeon Pat D. Do, M.D., claimant's

treating physician, is the most credible and claimant has only proven injury to her left upper extremity.

### FINDINGS OF FACT

Claimant began working for respondent, a temporary placement service, in March 2007. She was assigned a job with York International/Johnson Controls (York) in a repetitive labor job, performing final leak checks and installing metal panels on air conditioning units. This job was hand intensive. Beginning in May 2007, claimant began experiencing pain, swelling, numbness and tingling in both hands and both wrists, and problems in her right elbow. On June 25, 2007, claimant resigned due to the failure of York to move her to a different part of the assembly line.

Claimant was referred for treatment, receiving conservative care, and ultimately being referred by the ALJ to Dr. Do for an independent medical evaluation (IME) on November 13, 2007. Dr. Do diagnosed claimant with right and left wrist tendinitis and left trigger thumb. His examination of claimant's right upper extremity was essentially a normal examination, with the Tinel's and Phalen's tests being negative. Pinprick testing sensation was found to be intact. He treated claimant conservatively with physical therapy and anti-inflammatory medication and injections. When this proved unsuccessful, Dr. Do performed surgery on claimant consisting of a trigger thumb release and first dorsal compartment release for the wrist, both on the left side. He found claimant to be at maximum medical improvement (MMI) on May 22, 2008, and released her without restrictions. He found claimant had suffered a 3 percent permanent partial impairment of the left upper extremity for the injuries. Claimant's tendinitis in her right upper extremity had improved, and Dr. Do felt claimant had no permanent impairment on the right side.

Claimant was referred by her attorney to Dr. Murati for an evaluation on August 18, 2008. Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome; right ulnar cubital syndrome; and status post left dorsal compartment release and left trigger thumb release. He rated claimant at 10 percent to each upper extremity for the carpal tunnel syndrome, 10 percent to the right upper extremity for the right ulnar cubital syndrome and 4 percent of the left hand for the left thumb release. Dr. Murati acknowledged that he saw no nerve conduction studies on claimant's wrists and was unaware if any had been performed on claimant. Dr. Murati also noted the abnormal amplitude in the left ulnar nerve test, which he testified was consistent with an elbow injury. However, his impairment is for the right ulnar cubital syndrome for which there was no nerve test.

At the time of the regular hearing, claimant was working as a "helper" with a company identified as Service Master. Service Master is a restoration company for individuals who have experienced flood or fire damage.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.<sup>4</sup>

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>5</sup>

Claimant alleges injuries to her upper extremities from a series of traumas associated with her job. Both Dr. Do and Dr. Murati agree that claimant has experienced aggravations to her left upper extremity. However, Dr. Do has rated claimant at 3 percent to the extremity, with Dr. Murati rating substantially higher at 14 percent. The obvious difference is the finding by Dr. Murati of bilateral carpal tunnel syndrome, which Dr. Do discounts. Claimant had normal Phalen's and Tinel's during Dr. Do's evaluation and

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<sup>1</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

<sup>5</sup> K.S.A. 44-510e(a).

positive findings during the evaluation of Dr. Murati. With regard to the surgery on claimant's left hand, Dr. Do rated claimant at 3 percent to the left upper extremity, while Dr. Murati rated claimant at 4 percent to the left upper extremity. This is not a significant variation. Here, Dr. Do was appointed by the ALJ to perform an IME and later became claimant's treating physician. Dr. Murati was the expert hired by claimant, with the intent of maximizing her disability. The Board finds the opinion of Dr. Do to carry more weight. The ALJ seems to have given some credence to the findings of Dr. Murati, however, as the award was for an 8.5 percent impairment at the level of the arm. Based on the medical opinions in this record, the Board affirms that finding.

With regard to the right upper extremity, Dr. Do found nothing for which a rating would be appropriate. Dr. Murati rated carpal tunnel syndrome and found claimant to have ulnar cubital syndrome. Again, the carpal tunnel rating is based on subjective findings during the clinical examination. No nerve conduction tests were done to verify the carpal tunnel syndrome. But Dr. Do's examination found normal clinical results from the tests. Additionally, Dr. Murati appears to have diagnosed right ulnar cubital syndrome. No test was performed on the right side to verify this finding. The only testing done for this condition was to the left upper extremity, which Dr. Murati did not diagnose. The Board finds the opinion of Dr. Do carries the most weight and the determination by the ALJ that claimant has no permanent impairment to the right upper extremity is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has proven that she suffered a series of microtraumas to her left upper extremity resulting in an 8.5 percent impairment to the left arm, but has failed to prove any permanent injury or ratable impairment to her right upper extremity. The Award of the ALJ is affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated April 13, 2009, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.<sup>6</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
P. Kelley Donley, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>6</sup> K.S.A. 44-536(b).